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The Italian Constitutional Court: Safeguard of the Constitution

I. Introduction

In a country such as Italy, with its legal system's foundations settled in civil law concepts, it is fascinating to study the functioning of their Constitutional Court. To begin this journey, it is logical to start with the formation of the Italian Constitution. When Italy was rebuilding from their experiences in World War II, it was clear that the majority of Italians desired a democratic system of government.¹ This democracy was created by the Republican Constitution, which took effect in 1948.

The Constitution begins with the "Fundamental Principles" that state the basic social, political, and cultural values upon which the Italian Republic is based.² The "Fundamental Principles"³ comprise the first twelve articles of the Italian Constitution much like how the "Bill of Rights" compose the initial ten amendments of the Constitution of the United States. The Italian Constitution is then divided into two parts. First, is the "Rights and Duties of the Citizens" and then the "Structure of the Republic."⁴ The two parts total 139 articles.⁵

To preserve the integrity of the system, an autonomous body was needed to independently review the constitutionality of future legislation.⁶ Thus, Italy's Constitutional Court was established.⁷

1. W. Rodino, *The Constitutional Court of Italy*, SUPRANAT'L & CONST. CTS. 281, 284 (1992).

2. Luigi Moccia, *The Italian Legal System in the Comparative Law Perspective: An Overview*, 27 INT'L J. LEGAL INFO. 230, 236 (1999).

3. See Appendix A for a summary of "fundamental principles."

4. See Moccia, *supra* note 2, at 236.

5. *Id.*

6. Antonio Baldassarre,* *Structure and Organization of the Constitutional Court of Italy*, 40 ST. LOUIS U. L.J. 649, 650 (1996).

* At the time of the essay's publication, Baldassarre was President of the Constitutional Court of Italy. The essay was followed by a question and answer session with audience members at Saint Louis University.

7. See Rodino, *supra* note 1, at 284.

This Comment will begin with background information concerning the Court itself. The composition, functions, and jurisdiction of the Court will be among the preliminary matters discussed. Procedural mechanisms that insure the independence of the judges will also be an important consideration. This section will give the reader a sense of how the Court operates.

The remainder of the work will concern the current state of the law regarding selected constitutional issues. First, abortion law will be discussed. The Comment will focus on how the jurisprudence concerning abortion has evolved and developed into its current form.

In a related context, the Comment will shift to consider gender equality. Several decisions will be analyzed to demonstrate how the constitutional reasoning has evolved. Current issues such as Pregnant Worker's Rights and Father's Rights will also be discussed.

These topics will illustrate just how the Constitutional Court operates when faced with controversial decisions regarding the rights of an individual. It will become clear that the Court decided these issues with the best interests of Italy and the preservation of the constitution in mind. The goal of this Comment is to give the reader an appreciation of the effectiveness of this system of jurisprudence.

II. Background

A. *Formation*

After the end of the Second World War, the Constitution of the Italian Republic created a Constitutional Court.⁸ At the Constitutional Convention it was stressed that rather than ensure the protection of the individual's constitutional rights, the goal of the Constitutional Court's judicial review was to ensure that legislation respected the Constitutional limits imposed upon it.⁹ A conflict ensued regarding whether there must be a specific controversy before the Court, or if the Court could also review legislation directly.¹⁰ A compromise was reached allowing judicial review to take either form: direct or indirect.¹¹ However, it took eight years for the Constitutional Court system to finally begin its operation in 1956.

8. ALLAN R. BREWER-CARIAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 215 (1989).

9. Alessandro Pizzorusso et al., *The Constitutional Review of Legislation in Italy*, 56 *TEMP. L. Q.* 503, 504 (1983).

10. *Id.*

11. Law of March 11, 1953, as cited in Pizzorusso, *supra* note 9, at 531.

B. Composition

The Constitution created in 1948 provided unique mechanisms to ensure the independence of the Constitutional Court. In the Constitution, the Court is not created in the section dealing with the judiciary, but is in a separate passage dealing with constitutional guarantees.¹² A system was created in which the classical powers of a democratic state were equally represented.¹³ Article 135 of the Constitution provides the formula for the selection of the Constitutional Court Judges.¹⁴ The court is composed of fifteen judges, one-third selected by the President of the Republic, one-third selected by Parliament in joint session, and one-third by the highest ordinary and administrative courts.¹⁵ For the five members of the Court selected by the highest ordinary and administrative courts, three judges are elected by the judges of ordinary jurisdiction (Court of Cassation or Corte di Cassazione), one is elected by the judges of the Council of State (Consiglio di Stato), and one by the judges of the Court of Accounts (Corte dei Conti).¹⁶

The five members elected by Parliament must be voted into office by a majority of at least two-thirds of the members of Parliament. Three votes may be taken. After the third vote, if they

12. Costituzione (Constitution) [hereinafter COST.] art. 101-112, 134-137.

13. See Rodino, *supra* note 1, at 286.

14. Article 135 of the Constitution provides:

The Constitutional Court shall be composed of fifteen judges, one-third selected by the President of the Republic, one-third by Parliament in joint session, and one-third by the highest ordinary and administrative courts.

The judges of the Constitutional Court shall be chosen from among judges or retired judges of the highest ordinary or administrative courts, from university professors of law, and from lawyers with twenty years of practice.

The Court shall elect its President from among its own members.

Judges shall be appointed for twelve years.* They shall be replaced in rotation according to the provisions of the law; and they shall not be immediately eligible for reappointment.

The office of Judge of the Court shall be incompatible with that of a member of Parliament or of a Regional Council, or with practice as a lawyer, or with any other pursuit or office laid down by law.

In judicial proceedings involving the impeachment of the President of the Republic or a Minister, sixteen lay members shall take part in the deliberations of the Court with the regular bench. They shall be elected by the Chambers in joint session from among citizens qualified for election as Senators, at the beginning of each Parliament.

* Constitutional Law No. 2 of 1967 amended the judge's term from twelve years to nine years.

15. COST. art. 135, para. 1.

16. Article 2 of Law No. 87 of 1953, as cited in Rodino, *supra* note 1, at 286.

do not achieve the majority, then a three-fifths majority of the members of Parliament is sufficient for the election of a Constitutional Court judge.¹⁷ The last five judges are appointed by Italy's head of state, the President of the Republic.¹⁸

All fifteen judges must be chosen from among judges or former judges of the ordinary and administrative supreme courts, university professors of law, or lawyers who have practiced for at least twenty years.¹⁹ Judges of the Court may not engage in other careers or practice law while a judge on the Court.²⁰ In addition, judges are not allowed to be members of political parties or be involved in political activities.²¹

The Court chooses a President from among its members,²² usually considering only the senior members.²³ The President is elected to a three-year term and is eligible for re-election.²⁴ It is the job of the President to control the functions of the Court itself.²⁵ These duties include tasks such as determining hearing dates and nominating a judge who must prepare a case to be considered by the Court.²⁶ The President is also responsible for public relations appearances and must represent the Court in its affairs with other powers.²⁷

In Italy a distinction is made between civil/criminal courts (ordinary courts) and administrative courts. The highest civil/criminal court is the Court of Cassation. This court is often called the Supreme Court. It can either uphold or quash decisions of the lower courts. Special courts review administrative acts, with the Council of State being the most important of these courts. It has appellate jurisdiction in administrative legislation and is primarily concerned with the legality of the acts of public administration.

The Court of Accounts is empowered to review cases involving the handling of public money and hears cases against public officials involving their management of public funds. The Constitutional Court stands outside both the ordinary and administrative judiciary

See MAURO CAPPELLETTI, ET AL., *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION* 79-84 (1967).

17. See Rodino, *supra* note 1, at 285.
18. COST. art. 135, para. 1.
19. COST. art. 135, para. 2.
20. COST. art. 135, para. 5.
21. See Baldassarre, *supra* note 6, at 653.
22. COST. art. 135, para. 3.
23. See Baldassarre, *supra* note 6, at 655.
24. See Pizzorusso, *supra* note 9, at 508.
25. See Baldassarre, *supra* note 6, at 655.
26. See Pizzorusso, *supra* note 9, at 508.
27. See Baldassarre, *supra* note 6, at 655.

C. *Mechanisms to Ensure the Independence of the Judges*

As the embodiment of the Constitution, a work intended to endure indefinitely, the Constitutional Court must be completely insulated from political influence.²⁸ This includes a freedom from the interference of either the executive or the legislative branch.²⁹ The first of these guarantees is found in the Constitution itself. Article 135 mandates that a judge may not hold any other positions or offices including seemingly innocuous positions such as tenures at universities or being a company director.³⁰ In addition, judges are required to remain completely insulated from political influence, as implied by the prohibition against judges being affiliated with, or having membership in, political parties.³¹

A further guarantee is rooted in the qualifications required of the judges. As previously noted, a judge can only be chosen from among judges of the highest courts, university law professors, or attorneys with at least twenty years experience.³² This requirement has two purposes. First, only the most brilliant and experienced legal minds are considered.³³ Secondly, it is reasoned that people with such solid credentials must also have integrity and respect for the profession.³⁴ It is hoped that the honor in these potential judges will shield them from the potential complications that could arise.

Another guarantee of independence relates to the secrecy of the decision making process.³⁵ Unlike many systems, no dissenting opinions and no records of the votes of the Court are published.³⁶ This allows the judges to decide in an objective manner, without having to worry about possible repercussions should the public deem a decision to be improper.

A judge on the Court may not be removed, exempted, or suspended from office, without a majority vote of the other judges.³⁷ Criminal charges against a judge may only be brought with the

28. *Id.* at 652.

29. *Id.* at 653.

30. *See* Baldassarre, *supra* note 6, at 653.

31. COST. art. 135, para. 5.

32. COST. art. 135, para. 2.

33. *See* Baldassarre, *supra* note 6, at 654.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* Removal may occur as a result of an unforeseen physical incapacity, moral unworthiness or serious violations of the duties connected with the office of judge. In any respect, removal requires a two-thirds majority vote of the Court itself. *See* Pizzorusso, *supra* note 9, at 508.

authorization of the Court itself.³⁸ In addition, a judge cannot be prosecuted, arrested, or deprived of personal liberty, unless caught in the act of committing a crime for which a warrant or order to seize is mandatory.³⁹ On a similar note, any attack on the dignity of the Court constitutes a crime.⁴⁰

A final consideration regards the salary of the judges. Their salaries are determined by law and cannot be lower than the salary of the highest member of the judiciary (President of the Court of Cassation).⁴¹ This assurance guards against a judge being fearful that angry legislators can arbitrarily reduce a salary simply because of resentment towards unpopular opinions. Further, having these judges well compensated reflects the belief that their job is of paramount importance to the preservation of the Italian democratic society.

D. Functions of the Court

The power granted to the Court is found in Article 134 of the Constitution. This provision grants the Constitutional Court jurisdiction over three different types of controversies. First, the Court may decide on controversies concerning the constitutionality of State and regional laws, along with acts having the force of law.⁴² Secondly, the Court has jurisdiction when there is a conflict of jurisdiction between State authorities, between the State and a Region, or between Regions.⁴³ Finally, the Court is granted power to hear matters involving Constitutional charges made against either the President of the Republic, or the Ministers.⁴⁴ However, this provision was later amended, removing the Court's jurisdiction over

38. See Rodino, *supra* note 1, at 287.

39. See Baldassarre, *supra* note 6, at 654.

40. See Rodino, *supra* note 1, at 288.

41. See Baldassarre, *supra* note 6, at 654.

42. COST. art 134, para. 2.

Italy is composed of twenty-three geographic regions. Each region is given administrative and legislative powers over matters of regional and local concern. The acts of the region are closely monitored with the central government assigning a commissioner to each region in order to protect national interests. Parliament may negate regional laws that conflict with the interests of the nation or another region, and the Constitutional Court can quash laws that are violative of the Constitution.

See CAPPELLETTI, *supra* note 16, at 61-63.

43. COST. art 134, para. 3.

44. The Council of Ministers (Ministers) is the body that has the power to initiate legislation in Parliament.

the impeachment of a Minister.⁴⁵ As a result, if a Minister commits a crime in the exercise of his or her official function, he or she is no longer immune to the jurisdiction of the lower courts.⁴⁶ In summary, the Court acts in a judicial manner and exists to protect the Constitution and ensure that legislation does not violate its fundamental principles.⁴⁷

The Constitutional Court is empowered to determine the constitutionality of laws passed by the legislature.⁴⁸ Yet, the Court is also required to abstain from all political activity.⁴⁹ Obviously it is difficult to reconcile these conflicting principles. In an attempt to cure this dilemma, it was declared that the "evaluation of a political nature and any review of the use of the discretionary powers of Parliament" are forbidden.⁵⁰ In essence, the Court must stay out of the political affairs of the legislature. However, as a practical matter, this is a very tough task. In the past the Court has been criticized for having overstepped its authority, and meddled in the political arena.⁵¹ Conversely, some have argued that the Court has not gone far enough in controlling the activities of Parliament.⁵²

The Court also has jurisdiction when an individual citizen's rights are being violated.⁵³ If a person currently involved in a court proceeding believes that his constitutional rights have been impinged, a petition may be made to the lower court to have the issue raised before the Constitutional Court.⁵⁴ If the lower court judge deems the request to be reasonable, the matter is referred to the Constitutional Court.⁵⁵ The current proceedings of the lower court are then suspended until the Court rules on the constitutional issue.⁵⁶ This process thereby grants the Constitutional Court indirect review to determine if the party's constitutional rights have in fact been violated. Because the review is done on a case by case basis, if the Court rules the activity to be constitutional, future parties are not prevented from making a similar challenge.⁵⁷

45. Constitutional Law No. 1 of January 16, 1989, *as cited in* Rodino, *supra* note 1, at 287.

46. *See* Rodino, *supra* note 1, at 288.

47. *See* Baldassarre, *supra* note 6, at 650.

48. COST. art. 134, para. 2.

49. COST. art. 135, para. 5.

50. Art. 28 of Law No. 87 of 1953, *as cited in* Rodino, *supra* note 1, at 289.

51. *See* Rodino, *supra* note 1, at 289.

52. *Id.*

53. *See* Baldassarre, *supra* note 6, at 651.

54. *Id.*

55. *Id.*

56. Law of March 11, 1953, *as cited in* Pizzorusso, *supra* note 9, at 531.

57. *Id.*

Originally, there was great debate over whether the Court should have the power to review legislation that was enacted before the Constitution went into force. The Court considered this question to be important enough to be its very first issue ever decided.⁵⁸ It was determined that the court should have the competence to review laws enacted prior to 1948.⁵⁹

E. Indirect Review

During the course of judicial proceedings in the ordinary courts, either party or the Public Prosecutor may petition the lower court and officially question the constitutional legitimacy of a law.⁶⁰ The referring court must make a preliminary assessment of the relevance of the issue, and determine if a Constitutional Court referral is necessary in order to resolve the case fairly.⁶¹ If the judge decides that the issue of constitutionality is essential for the resolution of the case, then the issue is forwarded to the Constitutional Court and the current proceedings are suspended.⁶²

Once the lower court refers a case, the President of the Constitutional Court selects a judge to prepare a preliminary report for the Court.⁶³ The purpose of this report is to determine if the appeal is warranted.⁶⁴ There are six factors that go into determining whether the Constitutional Court should intervene: 1) the referring authority must be a court;⁶⁵ 2) the challenged act must have the force of legislation; 3) the constitutional issue must be relevant to the outcome of the case; 4) there cannot be a prior declaration that the question is inadmissible; 5) it must be possible to identify a specific

58. Decision No. 1, 1956, as cited in Rodino, *supra* note 1, at 289. Judicial decisions in Italy are not cited by the names of the parties, but only by their number and year. See Pizzorusso, *supra* note 9, n.23.

59. Decision No. 1, 1956, as cited in Rodino, *supra* note 1, at 289.

60. Law of March 11, 1953, as cited in Pizzorusso, *supra* note 9, at 531.

61. Law of March 11, 1953, No. 87, art. 24(1), as cited in Pizzorusso, *supra* note 9, at 516.

62. The question of the constitutional illegitimacy of a law or an act of the Republic with force of law, raised *ex officio* or alleged by one of the parties in the course of a trial, and not evidently considered unfounded by the judge, must be referred to the Constitutional Court for its consideration. See 1948 Constitutional Statute No. 1, Article 1.

63. See Pizzorusso, *supra* note 9, at 519.

64. *Id.*

65. The lower court may make the referral to the Constitutional Court based on a motion by either party or by the Public Prosecutor. Also, if the lower court believes that constitutional review is necessary, that court may refer the issue *sua sponte*. See Pizzorusso, *supra* note 9, at 516.

constitutional issue; and 6) notice must be given of the referral.⁶⁶ If these factors are met, then the Court will proceed with a hearing after giving the parties at least twenty days notice.⁶⁷

The hearing consists of an analysis of the materials submitted by the lower court judge, followed by argument by the parties.⁶⁸ The Court then meets to discuss the case. In an indirect referral, the Court must interpret the provision so as to apply it to the current fact situation.⁶⁹ There is a minimum of eleven judges that must attend the discussion.⁷⁰ A majority rule is in affect, with the President's vote as the tiebreaker.⁷¹ Once a decision is reached, the President nominates a judge to draft an opinion that is signed by all of the judges as the decision of the Court.⁷²

F. Direct Review

Article 127 of the Constitution provides that, "When the Government of the Republic considers that a law approved by the Regional Council exceeds the competence of the Region or conflicts with the interests of the Nation . . . the Government of the Republic may . . . raise the question before the Constitutional Court."⁷³ This is called direct review.

The procedure for direct review only slightly differs from that of indirect review. The presence of the parties is required in direct review, but parties need not be present in indirect review.⁷⁴ In addition, the Court in direct review can consider all possible interpretations of the challenged legislation.⁷⁵

G. Effects of a Constitutional Court Decision

As previously articulated, the Constitutional Court does not decide on disputes between parties, but instead settles questions arising as a result of conflicts with the constitution.⁷⁶ Therefore, there are only two ways the Court can decide a case: either rule that there

66. *Id.* at 522.

67. *Id.* at 520.

68. *Id.* The parties themselves need not attend argument before the Court. An appearance is only required in a direct review case.

69. *Id.* at 514.

70. *See* Baldassarre, *supra* note 6, at 655.

71. *Id.*

72. *See* Pizzorusso, *supra* note 9, at 520.

73. COST. art. 127.

74. *See* Rodino, *supra* note 1, at 293.

75. *See* Pizzorusso, *supra* note 9, at 514.

76. *See* Baldassarre, *supra* note 6, at 651.

is conformance with the constitution⁷⁷ or declare the legislation void.⁷⁸ When the Court declares that a provision of a law, or of an act having the force of law, is unconstitutional, the provision ceases to have effect from the day following the publication of the decision.⁷⁹ The Court may also declare a statute to be partially void, in which case the Court re-words the statute in order to make the legislation conform to the Constitution.⁸⁰

When the Court decides issues of a criminal nature, there is a different effect. If the case involved procedural criminal issues, the ruling does not apply to prior cases.⁸¹ There is an *ex post facto* effect given to the Constitutional Court's determination.⁸² If however, it is a case involving substantive criminal law, prior cases get the benefit of this decision.⁸³ A criminal conviction made pursuant to a norm declared unconstitutional becomes of no effect.⁸⁴ Therefore, procedural rules subsequently ruled unconstitutional have no effect on prior decisions. However, substantive criminal laws later determined to be unconstitutional will benefit a person convicted based on that rule.

With background materials regarding the Constitutional Court having been fully discussed, this Comment will now focus on how the court has handled the controversial issues of abortion and gender equality.

III. Abortion Law in Italy

A. *The Early Decisions*

It is only a recent development that abortion was legalized in Italy.⁸⁵ Prior to World War II, abortion was considered a crime

77. The legislation may be deemed constitutional on its face, or the Court may alter the wording to make it constitutional. See Baldassarre, *supra* note 6, at 652.

78. *Id.*

79. COST. art. 136 para. 1.

80. See Baldassarre, *supra* note 6, at 652. When it is decided that a statute can be cured with the alteration of the wording, there must be a majority vote on the precise wording. *Id.* The Court will use as few words as possible to make the statute conform to the constitution. *Id.*

81. See Pizzorusso, *supra* note 9, at 524.

82. *Id.*

83. *Id.*

84. Art. 30 of Ordinary Law No. 87 of 1953, as cited in Pizzorusso, *supra* note 9, at 524.

85. Charles Stanley Ross, *The Right of Privacy and Restraints on Abortion Under the "Undue Burden" Test: A Jurisprudential Comparison of Planned Parenthood v. Casey With European Practice and Italian Law*, 3 IND. INT'L & COMP. L. REV. 199, 220 (1993).

against the family.⁸⁶ When Italy was under fascist rule during the Second World War, abortion was considered so contemptuous, that it was regarded as a crime against the entire "race."⁸⁷ This was the state of the law until the 1970's.

In 1971, the Constitutional Court ruled that it was unconstitutional to prohibit the publicity of contraceptive methods.⁸⁸ After this liberal decision, pressure to reform abortion laws grew.⁸⁹ The current laws developed during the latter half of the decade.⁹⁰

The present abortion laws are derived in large part, from a Constitutional Court ruling of 1975.⁹¹ The Court held that the fundamental rights of the mother are superior to that of the developing fetus.⁹² In addition, the Court advanced the idea that the health of the mother, who is already a person, should outweigh the health of the embryo, which will only later become a person.⁹³ Finally, the Court ordered the legislature to take the necessary precautions to ensure that if abortions are performed, they are done only to avoid danger to the mother.⁹⁴ The Court wanted to make certain there are safeguards in place to make sure that mothers are making informed and intelligent decisions.⁹⁵

This 1975 law expressly declared article 546 of the penal code unconstitutional, because it prohibited all abortions.⁹⁶ The Court ruled that the penal code must recognize that pregnancy may be interrupted "when further development of the gestation could imply injury or danger which is grave, medically ascertained . . . and not otherwise avoidable for the health of the mother."⁹⁷ Thus, the time was ripe for major change in the state of Italian abortion law.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* Ross, *supra* note 85, at 220.

91. Decision of the Italian Constitutional Court of February 18, 1975, *as cited in* Ross, *supra* note 85, at 231 n.6.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Decision of the Italian Constitutional Court of February 18, 1975, *as cited in* Ross, *supra* note 85, at 231 n.6.

97. *Id.*

B. The 1978 Law on Abortion

The current status of Italian abortion law emanates from Law No. 194 of 1978.⁹⁸ This law begins with a recognition that human life shall be protected from inception and that individuals are guaranteed a right to responsible and planned parenthood.⁹⁹ The law provides that abortion shall not be a means of birth control, and to that end state and local agencies are mandated to develop mediosocial services in order to prevent abortion from being used for the purpose of birth control.¹⁰⁰

The next section of the Italian abortion law deals with the specific requirements of the aforementioned service centers. The woman must be informed of her rights regarding social, health, and welfare services available in her area.¹⁰¹ The pregnant female must also be made aware of labor law designed to protect expecting mothers.¹⁰² The centers are also directed to reach out to the female and help her deal with unforeseeable problems that cannot be adequately dealt with through normal avenues.¹⁰³ Finally, the agency is supposed to help the woman overcome the factors that have lead her to consider terminating the pregnancy in the first place.¹⁰⁴ It is clear from this law that abortion is a last resort to be considered only when all other alternatives have been exhausted.

To show that abortion is really only meant as a last resort, the counseling centers were allocated great deals of public money from which they are expected to meet the needs of expectant mothers.¹⁰⁵ An annual disbursement of fifty billion lira, to be divided among the country, was mandated.¹⁰⁶ This was seen as a great sign of progress

98. See Ross, *supra* note 85, at 220.

99. Art. 2 of Law No. 194 of May 22, 1978, as cited in Ross, *supra* note 85, at 231 n.120.

100. *Id.*

101. Art. 2 of Law No. 194 of May 22, 1978, as cited in Ross, *supra* note 85, at 220.

102. *Id.*

103. *Id.*

104. *Id.*

105. See Ross, *supra* note 85, at 222.

106. Art. 3 of Law No. 194 of May 22, 1978. In order for the family counseling centers to fulfill the tasks assigned by the present law, their financial support . . . is hereby increased by an annual disbursement of fifty billion lira (approximately 2.7 million U.S. dollars at 1 U.S. dollar = 1800 lira), to be divided among the base districts following the criteria established by the aforementioned article . . . The Minister of the Treasury is authorized to carry out, through appropriate decrees, the necessary variations to achieve balance. See Ross, *supra* note 85, at 231.

because the country showed its willingness to spend public money in the very personal area of abortion.¹⁰⁷

1. *Duties of Medical Personnel*—Specific procedures were set out for medical professionals to follow once a woman expresses her desire to abort her pregnancy. Counseling centers must guarantee the woman receives the necessary medical examinations.¹⁰⁸ Secondly, agencies are to be motivated by the “impact of economic, social, or family circumstances upon the pregnant woman’s health.”¹⁰⁹ Consultations are to be done in which professionals meet with the woman and, where the woman consents, the father of the “conceptus” in order to try and overcome the factors which have led her to seek an abortion.¹¹⁰ Further, the staff of the counseling centers must enable the mother to take advantage of her rights as a working mother, and provide her with all necessary assistance both during and after the pregnancy.¹¹¹ The same abortion procedures are followed whether the woman reports to a doctor of her choice or if she seeks the assistance of a state-sponsored clinic.¹¹²

If, after a careful consideration of the surrounding circumstances, the physician finds that termination is urgently required, the physician must immediately give the woman documentation which certifies that abortion is necessary.¹¹³ Once the woman has been issued the certificate, she may report to any establishment authorized to perform an abortion, and have her pregnancy terminated.¹¹⁴

The procedure differs if the physician, after considering all the particular facts, finds that the abortion is not necessary. The physician is instructed to then issue the woman another document which attests to the fact that the woman is in fact pregnant and seeks an abortion.¹¹⁵ It further directs her to reflect on her decision for a seven-day period.¹¹⁶ After the seven-day waiting period has elapsed, the woman may take the document she was given and report to an

107. See Ross, *supra* note 85, at 222.

108. Art. 5 of Law No. 194 of May 22, 1978, as cited in Ross, *supra* note 85, at 231 n.122.

109. *Id.*

110. *Id.* The Italian abortion statute does not require husband/father notification in order to have an abortion. See Ross, *supra* note 85, at 223.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See Ross, *supra* note 85, at 223.

116. *Id.*

authorized establishment in order to have an abortion performed.¹¹⁷ It is apparent through analysis of the abortion law that the Italian legislature wanted to ensure that pregnancy was terminated only when absolutely necessary to the health of the mother, or after the mother was given adequate time to reflect on her decision.

2. *Conscientious Objection*—A unique feature of the Italian law is the conscientious objector provision. This allows health-care personnel to declare in advance if they do not wish to participate in abortion procedures.¹¹⁸ This declaration must be forwarded to the provincial medical officer at or near the time one enters a position in which they may be exposed to individuals seeking abortions.¹¹⁹ The law allows this objection to be withdrawn at any time, in which case the physician is no longer exempted from providing his services.¹²⁰ If one declares an objection, they are not exempted from providing care before and after the termination of the pregnancy.¹²¹ The physician is only exempted from participation in the actual abortion procedure.¹²² Finally, if intervention is required in order to save the life of a woman in imminent danger, a physician is bound to act regardless of their objection.¹²³ This action may include providing an abortion.¹²⁴

Many critics of the abortion law argue that the conscientious objector provisions make abortions too difficult to procure in a country such as Italy, which is almost entirely Catholic and very outspoken in its anti-abortion views.¹²⁵ As a result, some contend

117. *Id.*

118. Art. 9 of Law No. 194 of May 22, 1978, as cited in Ross, *supra* note 85, at 231 n.123 states:

Health personnel and allied health personnel shall not be required to assist in the procedures referred to in Section 5 and 7 or in pregnancy terminations if they have a conscientious objection, declared in advance. Such declaration must be forwarded to the provincial medical officer and, in the case of personnel on the staff of the hospital or the nursing home, to the medical director, not later than one month following the entry into force of this Law, or the date of qualification, or the date of commencement of employment at an establishment required to provide services for the termination of pregnancy, or the date of the drawing up of a convention with insurance agencies entailing the provision of such services. . . .

Id.

119. *Id.*

120. *Id.*

121. *Id.*

122. Art. 9 of Law No. 194 of May 22, 1978, as cited in Ross, *supra* note 85, at 231 n.123.

123. *Id.*

124. *Id.*

125. See Ross, *supra* note 85, at 224, 225.

that a black-market is created in which abortions are done in an unregulated environment.¹²⁶

3. *Parental Notification*—In Italy, minors are required to notify a parent of their decision to have an abortion, unless a judge finds serious grounds which make notification impossible or inadvisable.¹²⁷ This issue has proven to be very controversial and has resulted in two referendums.¹²⁸ One referendum sought to liberalize the law by extending abortion to minors without any parental notification requirement.¹²⁹ A second referendum strove to restrict abortion by only permitting it under certain life-threatening situations.¹³⁰ However, the Italian citizenry voted to keep the law in tact and require parental notification, as long as there continues to be an adequate judicial bypass procedure through which a judge may intervene.¹³¹

Challenges to the Constitutional Court regarding abortion law are usually one of two types.¹³² The parental notification requirement for minors and the conscientious objector provision for doctors are among the most contentious elements of Italian abortion law.¹³³ However, for more than two decades the abortion law has remained

126. *Id.* at 225.

127. Art. 12 of Law No. 194 of May 22, 1978, as cited in Ross, *supra* note 85, at 231 n.125.

Requests for pregnancy termination under the procedures prescribed by this Law shall be made in person by the woman. Where the woman is under 18 years of age, the consent of the person exercising parental authority over the woman or her guardian shall be required for the termination of pregnancy. However, during the first 90 days, if there are serious grounds rendering it impossible or inadvisable to consult the persons exercising parental authority or the guardian, or if those persons are consulted but refuse their consent or express conflicting opinions, the counseling center or mediosocial agency, or the physician of the woman's choice, shall carry out the procedures set out in Section 5 and submit to the magistrate responsible for matters of guardianship [giudice tutelare] in the locality in which it operates, not later than seven days following a request, a report giving its views on the matter. Within five days, after interviewing the woman and taking account of her wishes, the grounds which she puts forward, and the report submitted to him, the magistrate may issue a decision, which shall not be subject to appeal, authorizing the woman to have her pregnancy terminated.

Id.

128. See Ross, *supra* note 85, at 225, 226.

129. *Id.* at 126.

130. *Id.*

131. *Id.* at 226.

132. *Id.* at 227.

133. See Ross, *supra* note 85, at 227.

intact despite the many attacks that have ultimately reached the Constitutional Court.¹³⁴

The Comment will now focus on an examination of another controversial subject: the equal rights of women.

IV. Gender Equality

A. *Gender Equality Under the Republican Constitution*

The principle of equality is first articulated in the “Fundamental Principles” section of the Constitution.¹³⁵ Article 3 begins by establishing that all citizens are considered equal before the law, without distinction based on gender.¹³⁶ However, it is apparent that the drafters recognized that these words alone would not be enough to curtail discrimination. The article concludes by mandating the removal of all barriers that stand in the way of social development.¹³⁷

Gender equality is specifically discussed in Article 37 of the Constitution.¹³⁸ Among other things, the article provided that women should receive the same pay as men, if they are doing the same work.¹³⁹ However, the phrase “essential family function of women” was used, which made the passage especially vague.¹⁴⁰ After all, if equality was sought, why did women have any more of an “essential family function” than men?¹⁴¹ It was generally agreed that

134. *Id.* at 228.

135. Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 536.

136. COST. art. 3. *See also* n.3.

137. *Id.*

138. *See* Wright-Carozza, *supra* note 135, at 538. Article 37 reads as follows: Women workers have the same rights and the same remuneration for equal work as men workers. Their conditions of work must allow the fulfillment of their essential family functions, and assure to mother and child special and adequate protection *Id.*

139. COST. art. 37.

140. *See* Wright-Carozza, *supra* note 135, at 539.

141. It was argued by the Constitutional Assembly that Article 37’s “essential family function” clause referred solely to the woman’s biological role in child bearing. Yet Article 31 specifically protects motherhood: “The Republic shall, by economic and other measures, assist the institution of the family and the fulfillment of its tasks, with particular regard to large families. It shall protect motherhood, infancy, and youth by promoting institutions necessary for that purpose.”

Because motherhood was addressed in Article 31, a controversy revolved around exactly what the framers had in mind by the “essential family function” language of Article 37. Was the importance of the family simply being reiterated, or were the framers trying to keep women confined to their traditional domestic

the provision perpetuated gender discrimination by relegating women to domestic duties and regarding men as the family's wage earner.¹⁴²

B. Movements for Equal Rights Subsequent to the Constitution

It was obvious that the Constitution would not offer much of a cure to gender discrimination. Many of the existing laws were still around from the fascist era before World War II.¹⁴³ As a result, movements surfaced to take advantage of the ambiguous language in Article 37 and get tougher laws against gender-based discrimination passed.

The first such campaign attempted to modernize laws regarding pregnant women in the workplace.¹⁴⁴ This 1950 Act was a huge step towards protecting women's rights in the workplace.¹⁴⁵ This law required maternity leave before and after pregnancy, and guaranteed women their job after their maternity leave was over.¹⁴⁶ This law was an important advancement, as it put teeth into Article 3 of the Constitution. The legislature for the first time removed barriers that impeded social equality. It appeared that gender equality was no longer going to be an empty promise.

Great strides were made in the 1960s also as legislation was passed that barred employers from firing females because of their marriage.¹⁴⁷ But, perhaps the most important decision of all was advanced by the Constitutional Court, when in 1969 the interpretation of Article 37 was first considered.¹⁴⁸ The Court sought a balance between the competing principles of equality and the

roles?

142. See Wright-Carozza, *supra* note 135, at 539, 540.

143. *Id.* at 540.

144. *Id.* at 541.

145. This law required women to take a maternity leave of six weeks prior to and eight weeks after childbirth. It also provided women with eighty percent of their normal pay during the leave period, which was to be sustained by the social security system. Finally, the new law prohibited employers from firing women during pregnancy and for one year after childbirth, which guaranteed their jobs after returning from leave. See Wright-Carozza, *supra* note 135, at 541.

146. Law of 26 Aug. 1950, No. 860, art. 5 Gazz. Uff. No. 253, 3 Nov. 1950, as cited in Wright-Carozza, *supra* note 135, at 592 n.37.

147. Law of 9 Jan. 1963, No. 7 Gazz. Uff. 27, 30 Jan. 1963, as cited in Wright-Carozza, *supra* note 135, at 592 n.46. Previously, employers would commonly terminate young married females, as an imminent pregnancy was anticipated. Thus, the employer would avoid the application of the maternity laws. See Wright-Carozza, *supra* note 135, at 542.

148. See Wright-Carozza, *supra* note 135, at 542.

traditional notion of female homemaker.¹⁴⁹ The Court recognized the importance of both objectives and decided that the purpose of the constitution was to achieve compatibility between each woman's role in the workplace and in the family.¹⁵⁰ The female should be able to avoid "the dilemma of having to sacrifice employment in order to safeguard her liberty to give life to a new family, or, vice versa to have to renounce this fundamental right in order to avoid unemployment."¹⁵¹ With this decision it was apparent that the Constitutional Court interpreted the constitution as protecting both the woman's right to a family and the woman's right to be free of unfair employment practices.

In the coming years, the impetus for further rights grew. In 1971, the Law for Working Mothers was passed.¹⁵² This law provided, inter alia, an extension of the mandatory leave period, and prohibited employers from assigning dangerous or unhealthy work to pregnant workers or women who had recently given birth.¹⁵³ The law also increased sanctions against employers who violated any of these maternity laws.¹⁵⁴

Although clearly a step in the right direction for the protection of the traditional family unit, many critics felt that this law was actually a step backwards for females.¹⁵⁵ The law merely adjusted labor conditions so that females could continue to occupy the role as homemaker.¹⁵⁶ The law insinuated that the primary duty of the female was to bear children, but the right to work will also be protected and available.¹⁵⁷

149. *Id.*

150. *Id.*

151. Corte Cost., 5 Mar. 1969, 92 Foro It. I 545, as cited in Wright-Carozza, *supra* note 135, at 592.

152. Law of 30 Dec. 1971, No. 1204, Gazz. Uff. No. 14, 18 Jan. 1972, as cited in Wright-Carozza, *supra* note 135, at 592.

153. See Wright-Carozza, *supra* note 135, at 542. The 1971 law prohibited employers from assigning dangerous, heavy, or unhealthy work during pregnancy and for seven months after childbirth. The period of mandatory leave was extended to two months prior to the presumed date of delivery and three months afterwards, still at eighty percent of normal pay. During an optional six months of additional leave, the mother received thirty percent of her normal pay under the new law, at public expense. See Law of December 30, 1971.

154. Law of 30 Dec. 1971, No. 1204, Gazz. Uff. No. 14, 18 Jan. 1972, as cited in Wright-Carozza, *supra* note 135, at 592.

155. See Wright-Carozza, *supra* note 135, at 544.

156. *Id.*

157. *Id.*

C. *The Equal Treatment Act (ETA) of 1977*

Spurred by the Equal Treatment Directive passed by the Council of the European Community, the purpose of the Equal Treatment Act (ETA) was to effectuate the principle of equal treatment for men and women as regards access to employment and notions of the family.¹⁵⁸ The ETA invalidated any remaining legislation that restricted women's work.¹⁵⁹ It also prohibited direct or indirect discrimination based on sex, guaranteed equal pay for identical work, and generally equalized social benefits for male and female workers.¹⁶⁰ Finally, the ETA promoted the shared responsibility by the mother and father of child-rearing responsibilities. Under the new law, a father as well as a mother was now allowed to take a leave of absence in order to care for a child.¹⁶¹ In the past, this leave was only available to the mother.¹⁶²

D. *The Role of the Constitutional Court*

Four different lower court cases were indirectly referred¹⁶³ to the Constitutional Court in order to decide the constitutionality of the 1971 maternity law.¹⁶⁴ In all four cases, the plaintiffs were fathers of newborns whose mothers had died or become incapacitated as a result of labor complications.¹⁶⁵ The fathers requested that the leave periods available to women in the 1971 law be extended to fathers as well.¹⁶⁶

In its analysis, the Court started by considering the rationale behind the 1971 maternity law.¹⁶⁷ On its face the law was intended to safeguard the health of mothers and pregnant women, give them job security, and help them overcome financial burdens associated with maternity.¹⁶⁸ However, the Court went deeper in its examination and concluded that the overriding concern was the best interests of the

158. Law of 9 Dec. 1977, No. 903, Gazz. Uff. No. 343, 17 Dec. 1977, as cited in Wright-Carozza, *supra* note 135, at 592.

159. *Id.*

160. *Id.*

161. *Id.*

162. Law of 30 Dec. 1971, No. 1204, Gazz. Uff. No. 14, 18 Jan. 1972, as cited in Wright-Carozza, *supra* note 135, at 592.

163. See *supra* note 65 and accompanying text.

164. See Wright-Carozza, *supra* note 135, at 549.

165. *Id.*

166. *Id.*

167. *Id.*

168. Corte Cost., 19 Jan. 1987, 110 Foro It. 313, 314, as cited in Wright-Carozza, *supra* note 135, at 592. See also Wright-Carozza, *supra* note 135, at 549.

child.¹⁶⁹ All of the provisions and accommodations that were advanced to the mothers were to increase the chance that the babies are born healthy and the mother was able to provide for the child without having to worry about seeking new employment.¹⁷⁰

Next, the Court considered the 1977 ETA. The Court ruled that the ETA promoted "a new vision of the roles of the parents in family life, and in particular of the way in which they contribute to the assistance of their children with equal rights and duties."¹⁷¹ Because the 1977 law extended child care leave to fathers, the Court supported their original premise that the best interests of the child is to be of paramount importance.¹⁷²

The Court ruled that the 1971 maternity law was unconstitutional because it guaranteed women a three month leave after childbirth, but did not guarantee similar rights to the father, even when the mother was incapacitated or deceased.¹⁷³ For these reasons, the Court extended the ETA's benefits to fathers including the right to a three-month leave after the child is born.¹⁷⁴

Several years later, the Constitutional Court was faced with a similar case in which the father sought to take the three-month mandatory maternity leave in place of the mother, who renounced her right to do so.¹⁷⁵ The lower court referred the case to the Constitutional Court because the law treated the father differently from the mother with respect to his right to participate in the early phases of the child's life.¹⁷⁶

The Court used a similar analysis as the 1987 case, and extended maternity laws to include fathers.¹⁷⁷ The Court went on to articulate that laws that treat men and women differently are inherently unconstitutional. Because the legislation did not grant leave to the father in place of the mother, it violated the constitution's guarantee of equality of the spouses, protection of families, and protection of minors (Articles 29, 30, and 31).¹⁷⁸

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* Wright-Carozza, *supra* note 135, at 551.

173. *Id.* at 548.

174. Corte cost., 19 Jan. 1987, 110 Foro It. I 313, 314, *as cited in* Wright-Carozza, *supra* note 135, at 592 n.94. *See also* Wright-Carozza, *supra* note 135, at 551.

175. *See* Wright-Carozza, *supra* note 135, at 551.

176. *Id.*

177. Corte Cost., 15 July 1991, 114 Foro It. I 2297, 2299, *as cited in* Wright-Carozza, *supra* note 135, at 592 n.116.

178. *See* Wright-Carozza, *supra* note 135, at 552. Article 29 provides:

The Republic recognizes the rights of the family as a natural social unit

V. Conclusion

Clearly in its infancy, as compared to other more established legal bodies, the Italian Constitutional Court has in its early years proven to be a praiseworthy tribunal. The framers of the Constitution intended the judges on this Court to be independent and nonpartisan. The drafters would likely be very pleased with the way the Constitutional Court has safeguarded and protected the democratic ideals contained within the Republican Constitution of 1948.

The abortion issue was especially divisive. In a country that is overwhelmingly Catholic, and as a result inherently opposed to the idea of abortion, the 1975 ruling allowing abortion was particularly shocking. Public outrage followed and the Court took a great deal of criticism from all segments of the population including the media, the Catholic Church, and the general public. Nevertheless, the Court did not waver and the decision has lasted twenty-five years. It has perhaps even become more liberal through various legislative enactments.

The abortion decision exemplifies exactly why the creators of the Constitution sought an independent Constitutional Court that would not yield to popular sentiment. With an issue so controversial, it would be tough for anyone to remain objective. But, the judges on the Court realized that they were entrusted with safeguarding the constitution. The Court did its job as proscribed by the constitution and did what they thought was best for the future of a democratic Italy.

Similarly, the battle for equal rights was also very heated. Italian society has historically been patriarchal, and many thought that it was simply unheard of for women to enjoy equal rights as men. However, societal changes worldwide spurred a movement for greater female rights, especially in the workplace.

When the issue first reached the Constitutional Court in the late 1960s, the Court recognized the problems that women were having balancing employment and family needs. As a result, legislation was passed that regulated how employers were to treat pregnant female employees. In time, the Court ruled that any legislation treating males and females differently was inherently unconstitutional. Males

founded on marriage. Marriage is founded on the moral and legal equality of the spouses . . . Article 30 provides: It is the duty and right of parents to maintain, instruct, and educate their children In cases of incapacity of the parents, the law shall provide for the fulfillment of their duties.

were even allowed to take maternity leave based on a Constitutional Court decision in 1991.

Once again, the Court decided a very controversial matter in a non-biased manner. The judges realized that the constitution warranted judgments that may be less than popular. However, the Court performed their duty with the constitution and the best interests of Italy as their only guides.

These issues are illustrative of how the Constitutional Court has done such an honorable job preserving the framer's ideals of more than fifty years ago. As a result, the Italian Constitution remains strong and endures as a universal symbol of democracy.

Daniel S. Dengler

Appendix A

The “fundamental principles” can be summarized as follows:

Article 1- “Italy is a democratic republic founded on work.” All people enjoy sovereignty within the limits of the Constitution.

Article 2- The “Republic recognizes and guarantees the inviolable rights of man” . . . and requires the performance of “fundamental duties of political, economic, and social solidarity.”

Article 3- “All citizens have equal social standing and are equal before the law, without distinction of sex, race, language, religion, political opinion, or social and personal conditions.” . . . The Republic shall remove obstacles that impede the development or participation of all workers.

Article 4- All citizens have the right to work. Each citizen has a duty to exercise an activity that contributes to the greater good of society.

Article 5- The Republic shall encourage local autonomy and decentralization.

Article 6- Linguistic minorities shall be protected.

Article 7- The State and the Catholic Church shall be exclusive of one another.

Article 8- All religious creeds are by law considered equal, and each shall have the right to organize themselves.

Article 9- The Republic shall promote the development of culture and seek the protection of the historical and artistic heritage of the nation.

Article 10- The Italian legal systems should be in conformity with established standards of international law . . . Foreigners shall have the right to asylum in the Republic without fear of extradition for political offenses.

Article 11- “Italy renounces war as an instrument of offense against the liberty of other peoples and as a means of resolving international disputes; she will agree, on conditions of equality with other states, to the limitations of her sovereignty necessary to an organization for assuring peace and justice among nations; and will promote and favor international organizations constituted for this purpose.”

Article 12- The Italian flag shall consist of vertical stripes of green, white, and red.

See ITALY COST. ART. 1-12

